No. 80-1100

In the Supreme Court of the United States

October Term, 1980

MARRIOTT CORPORATION, *et al.*,
Petitioners,

vs.

BETHLEHEM STEEL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

LUCIAN Y. RAY
JOHN H. HANNINEN
Counsel of Record
RAY, ROBINSON, HANNINEN & CARLE
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Counsel for Respondent

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0647

LIST OF SUBSIDIARIES OF BETHLEHEM STEEL CORPORATION

BETHLEHEM STEEL CORPORATION
ENTERPRISES NOT CONSOLIDATED

50% OR LESS OWNED:

- Brinco Limited
- Erie Mining Company
- Erie Mining Company, A Limited Partnership
  - Erie Development Company
- Gas & Oil Joint Ventures:
  - C & K/Bethlehem
  - Kirby/Bethlehem
  - Forest Oil/Bethlehem
- Industria e Comercio de Minerios S. A.—Icomi
  - Acos Anhanguera, S. A.
  - Amapa Florestal e Celulose—AMCEL
  - Brumasa Madeiras S. A.
  - Caemi-Cummins Motores, S. A.
  - Companhia Progresso do Amapa—Copram
  - Empreendimentos Brasileiros de Mineracao S. A. —E.B.M.
  - 41 Exploration Companies
  - 11 Forestry Companies
- Iron Ore Company of Canada
  - Carol Lake Company, Ltd.
  - Gulf Power Company
  - Hotel Montagnais, Inc.
  - Quebec North Shore and Labrador Railway Company
  - Retty Metals, Ltd.

Iron Ore Land Company
Northern Land Company, Limited
La Compagnie de Telephone Ungava
Schefferville Power Company
Twin Falls Power Corporation Limited
Labrador Telephone Co.

Itmann Coal Company

Kaycee Bentonite Partnership

Lamco Joint Venture

Mastic Inc.

Met-Mex Penoles, S. A. de C. V.
Inmobiliaria Tamrey
Penoles Metals & Chemicals, Inc.

Minera Apolo, S. R. de C. V.

Presque Isle Corporation

Restauradora de las Minas de Catorce, S. A. de C. V.

Sichon (Thailand) Limited

Societé des Mines de Fer de Mekambo, S. A. (Somifer)

Thailand Offshore Joint Venture

OVER 50% OWNERSHIP:

Bethlehem Hotel Corporation

Mahoning Ore and Steel Partnership

Nordex Joint Venture

Nubeth Joint Venture

Ontario Iron Company

Sierra Rutile Limited

Venoil Inc.

Venpet Inc.

TABLE OF CONTENTS

List of Subsidiaries of Bethelehem Steel Corporation I
Table of Authorities III
Summary of Argument 1
Argument 2
Conclusion 19

TABLE OF AUTHORITIES

Cases

American Banana Company v. United Fruit Company, 213 U.S. 347 (1909) 5
American Export Lines, Inc. v. Alvez, 100 S. Ct. 1673 (1980) 14
Black Diamond S.S. Corp. v. Robert Stewart & Sons (Norwalk Victory), 336 U.S. 386 (1949) 2, 10
Cuba R.R. Co. v. Crosby, 222 U.S. 473 (1912) 2, 6, 11
Cunard Steamship Co. v. Mellon, 262 U.S. 100 13
Curtis v. Campbell, 76 F.2d 84 (3rd Cir. 1935) 5
Dick Meyers Towing Service, Inc. v. United States, 577 F.2d 1023 (5th Cir. 1978) 7-8, 11, 12
Federal Commerce & Nav. Co. v. M/V Marathonian, 528 F.2d 907 (2nd Cir. 1975) 15
Gartland S.S. Co. v. Elgin, Joliet and Eastern Ry. Co., 277 F.2d 382 (7th Cir. 1960) 9, 12
General Foods Corporation v. United States of America, et al., 448 F. Supp. 111 (D. Md., 1978) 8
In Re China Union Lines, Ltd., 285 F. Supp. 426 (S.D. Tex., 1967) 8, 12

In Re Lyra Shipping Co., Ltd., 360 F. Supp. 1188 (E. D. La., 1973) 8, 12
Ishizaki Kisen Co., Ltd. v. United States, 510 F.2d 875 (9th Cir. 1975) 2
Lauritzen v. Larsen, 345 U.S. 571 (1953) 13, 14
Moragne v. States Marine Lines, 398 U.S. 375 (1970) 14
National Steel Corp. v. Great Lakes Towing Co., 574 F.2d 339 (1978) 18, 19
Northern Pacific Railroad v. Babcock, 154 U.S. 190 (1894) 4
Oppen v. Aetna Insurance Co., 485 F.2d 252 (9th Cir. 1973) 11, 12
Petition of Kinsman Transit Company, 388 F.2d 821 (2d Cir. 1968) 6, 9, 11, 18
Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927) 15, 17
Sea-Land Services, Inc. v. Gaudet, Adm'rx, 414 U.S. 573 (1974) 14
Slater v. Mexican National R. Co., 194 U.S. 120 2
Smith v. Condry, 42 U.S. 28 2
Union Oil Company v. Oppen, 501 F.2d 558 (9th Cir. 1974) 7, 11
United States v. Flores, 289 U.S. 137 13
Venore Transp. Co. v. M/V Struma, 583 F.2d 708 (4th Cir. 1978) 16, 17
Western Union Telegraph Co. v. Brown, 234 U.S. 542 2

No. 80-1100

In the Supreme Court of the United States

October Term, 1980

MARRIOTT CORPORATION, *et al.*,
Petitioners,

vs.

BETHLEHEM STEEL CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SUMMARY OF ARGUMENT

The decision below is in accordance with the legal principle that the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred. On the same facts a Court of competent jurisdiction in Canada held that there was no right to recover for economic losses to vessels detained but not physically damaged by the obstruction of the Canadian waterway known as the Welland Canal. There is no other legal principle which governed the decision below. No question of law is at issue that justifies the grant of a Writ of Certiorari.

ARGUMENT

The legal principles which govern decision here have been well established by this court and the federal courts generally for many years. The right to recover for a tort depends upon and is measured by the law of the place where the tort occurred.

Slater v. Mexican National R. Co., 194 U.S. 120

Cuba R.R. Co. v. Crosby, 222 U.S. 473

Western Union Telegraph Co. v. Brown, 234 U.S. 542

Where maritime torts occur in foreign waters, the rights and liabilities of the parties will depend on the law of the foreign nation in whose waters the tort occurred as construed by its courts.

Smith v. Condry, 42 U.S. 28

Black Diamond S.S. Corp. v. Robert Stewart & Sons (Norwalk Victory), 336 U.S. 386 (1949)

Ishizaki Kisen Co., Ltd. v. United States, 510 F.2d 875 (9th Cir. 1975)

The court below carefully considered the controlling principle of *lex loci delicti commissi* in holding that the law of the place governed the right to recover; the accident occurred in the waters of Canada and hence the Canadian law applied.

The district court dismissed the claims for vessel detention damages relying primarily on a decision of the Canadian Federal Trial Court which dismissed similar claims for delay to American vessels of National Steel Corporation filed in the Canadian limitation action. The court below held that the decision of Justice Addy of the Federal

Court of Canada correctly stated the law of Canada (App. p. 11). This, we submit, was inescapable since no appeal was taken from Justice Addy's decision in Canada on the same facts and issues and his decision was completely supported by citations of leading Canadian cases which the courts below considered and found applicable. Consequently, it is quite clear that Canadian law does not provide any cause of action for losses due to the detention of petitioners' vessels in this case and this was the basis for the decision below.

Petitioners seek to have this case reviewed because of (1) a supposed necessity for applying an "overriding domestic policy translated into law" which requires payment of economic losses to foreign vessels detained because of the negligent but unintentional obstruction of a foreign public navigable channel and (2) an alleged conflict between decisions of Circuit Courts of Appeal. The first question was adversely decided to petitioners but the right of a time charterer to recover vessel detention damages was never decided by the court below and was not a basis for its decision. It would be more accurate to state the sole issue as follows:

Whether the Law of Canada as construed by its own courts denying any recovery for economic loss to a vessel which is detained but not physically damaged by the unintentional negligent obstruction of a public navigable waterway located within Canada is applicable and controlling on the same facts?

The petitioners seek to avoid the application of the law of Canada, where the tort occurred, that does not permit a recovery of economic loss for detention of vessels which sustained no physical injury, by contending that the law of the United States does permit such a recovery and should be applied. Although conceding the general

rule that substantive rights in a tort action are governed by the law of the place where the wrong occurred, petitioners argue that a claim of economic loss by reason of the detention of a vessel is an exception because of the existence of an "overriding domestic policy translated into law". The argument is fallacious for two reasons: (1) domestic public policy would not create such rights in a foreign jurisdiction but may determine whether rights arising under foreign law should be enforced in a domestic forum, and (2) there is no such public policy.

The petitioners have misunderstood the legal meaning of public policy and its application where it exists. In *Northern Pacific Railroad v. Babcock,* 154 U.S. 190 (1894) it was held that the right to recover and the limit of the amount of the judgment are governed by the *lex loci,* and not by the *lex fori,* and the following language contained in a Minnesota case with respect to public policy, was quoted with approval, on pages 197-198:

> " 'But it by no means follows that, because the statute of one State differs from the law of another State, therefore it would be held contrary to the policy of the laws of the latter State. Every day our courts are enforcing rights under foreign contracts where the *lex loci contractus* and the *lex fori* are altogether different, and yet we construe these contracts and enforce rights under them according to their force and effect under the laws of the State where made. To justify a court in refusing to enforce a right of action which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that, for some other such reason, the enforcement of it would be prejudicial to the general interest of our own citizens. If the State of Iowa sees fit to impose

this obligation upon those operating railroads within her bounds, and to make it a condition of the employment of those who enter their service, we see nothing in such a law repugnant either to good morals or natural justice, or prejudicial to the interests of our own citizens.' "

In *Curtis v. Campbell,* 76 F.2d 84 (3rd Cir. 1935) on page 85:

> "There is a marked difference between public policy—something that affects 'the morals or natural justice,' or the 'general interest of the people of the estate,' justifying refusal to enforce a foreign right of action—and mere difference in state laws with respect to a particular subject."

Petitioners are seeking to create a cause of action for vessel detention within the territory of a foreign nation where none presently exists by claiming that public policy requires it. To do so, would violate all basic concepts of our tort law and comity between nations under international law.

In *American Banana Company v. United Fruit Company,* 213 U.S. 347 (1909), on page 356:

> "But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican National R.R. Co.,* 194 U.S. 120, 126. . . . For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent."

In *Cuba R.R. Co. v. Crosby, supra,* 222 U.S. 473, 478 (1912):

> "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. . . . That and that alone is the foundation of their rights."

Petitioners have misconstrued the effect of public policy where it exists to deny the enforcement of a right arising under foreign law in a domestic forum and do not have any basis for asserting that there is a public policy in the United States which holds that economic losses arising from vessel detention due to the negligent obstruction of a public waterway are recoverable when no physical damage has been inflicted to the vessel.

In *Petition of Kinsman Transit Company,* 388 F.2d 821 (2d Cir. 1968), a vessel broke loose from its moorings on the Buffalo River in Buffalo, New York during the winter and was carried downstream by the current. It struck a second vessel which in turn broke loose from its moorings and both vessels were carried downstream until they crashed into a bridge which collapsed and obstructed the Buffalo River, a public, federally maintained, navigable waterway. It was held that vessel and cargo owners unable to unload their cargos by conventional means due to the obstruction of the river could not recover damages in the absence of proof that the interference was intentional. On pages 824-825:

> "On the previous appeal we stated aptly: 'somewhere a point will be reached when courts will agree that the link has become too tenuous—that what is claimed to be consequence is only fortuity.' 338 F.2d

at 725. We believe that this point has been reached with the Cargill and Cargo Carriers claims. Neither the Gillies nor the Farr suffered any direct or immediate damage for which recovery is sought. The instant claims occurred only because the downed bridge made it impossible to move traffic along the river. Under all the circumstances of this case, we hold that the connection between the defendants' negligence and the claimants' damages is too tenuous and remote to permit recovery. 'The law does not spread its protection so far.' Holmes, Jr., in Robins Dry Dock, supra, 275 U.S. at 309, 48 S.Ct. at 135."

The Ninth Circuit is in accord with the Second Circuit in requiring a showing that some special right has been invaded in order to recover distinguishable from others who may be adversely affected in a general way. In *Union Oil Company v. Oppen,* 501 F.2d 558 (9th Cir. 1974), commercial fishermen sued oil companies for damages to their business as a result of the Santa Barbara oil spill in 1969. The court allowed recovery to the commercial fishermen since the escaping oil caused direct injury and because of protection which has been long accorded to fishermen by the maritime law. However, the court strongly upheld the general policy of not allowing a recovery for purely economic losses, stating at 570-571:

". . . our holding in this case does not open the door to claims that may be asserted by those, other than commercial fishermen, whose economic or personal affairs were discommoded by the oil spill of January 28, 1969. The general rule urged upon us by defendants [of no recovery for purely economic loss] has a legitimate sphere within which to operate."

The Fifth Circuit is in accord with the Second Circuit. In *Dick Meyers Towing Service, Inc. v. United States,* 577

F.2d 1023 (5th Cir. 1978) it was held that there could be no recovery for detention of the vessel caused by the negligent obstruction of a public waterway when no physical damage has been inflicted upon the vessel. The decision had the effect of nullifying the two district court decisions in that circuit upon which petitioners rely, namely, *In Re Lyra Shipping Co., Ltd.*, 360 F. Supp. 1188 (E.D. La., 1973) and *In Re China Union Lines, Ltd.*, 285 F. Supp. 426 (S.D. Tex., 1967).

In *General Foods Corporation v. United States of America, et al.*, 448 F. Supp. 111 (D. Md., 1978), the district court carefully reviewed the recoverability of economic losses as a matter of law and granted the motion of the United States to dismiss such claims. The applicable and leading cases were carefully analyzed. The court concluded that *In Re Lyra Shipping Co., Ltd., supra,* and *In Re China Union Lines, Ltd., supra,* which petitioners urge as establishing public policy, are merely two isolated cases, stating on page 116:

> "These two cases are inconsistent with the greater weight of authority, and have not been followed. Further, even these expansive cases do not impose liability which is as far reaching as that which would be imposed in the present case. The time period was very short in *In Re China*, and the number of vessels using the locks in *In Re Lyra* was finite. Imposition of liability in the present case involves precisely the limitless type of liability which courts have consistently considered excessive for negligence. Neither the case law nor the sound policy considerations on which the decisions are bottomed support the plaintiff's claims for its economic losses. Even assuming General Foods is a foreseeable plaintiff, 'the law does not spread its protection so far.' "

The contention of the petitioners that *Gartland S.S. Co. v. Elgin, Joliet and Eastern Ry. Co.*, 277 F.2d 382 (7th Cir. 1960) establishes a right to recover for vessel detention due to the negligent obstruction of a navigable public waterway without physical damage having been inflicted unto the detained vessel is incorrect. In that case the parties apparently assumed or agreed that detention damages were recoverable during the proceedings in the district court and that question was not considered nor was it raised in the appeal.

Contrary to the claims made by the petitioners, all of the federal circuit courts in which the question has been considered have ruled that vessel detention damages caused by the negligent obstruction of a navigable public waterway are not recoverable when no physical damage has been inflicted to the detained vessel for reasons which are identical to those on which the law in Canada is based. In the Memorandum and Order of the district court in this case, 449 F.Supp. 68, the July 21, 1977 judgment and order of the Federal Court of Canada, by Justice Addy, was reviewed in detail. The reasons for Justice Addy's decision were considered to be adequate and based upon decisions of the courts of Canada which furnished ample support for his conclusions. The vessel detention claims in the district court and the Federal Court of Canada were based upon the same facts. In dismissing petitioners' claims, the district court pointed out that the decision in *Petition of Kinsman Transit Company, supra,* was in harmony with the law of Canada.

There is nothing which supports petitioners' contention of a domestic policy favoring the recoverability of vessel detention damages for negligent obstruction of a public waterway in this country. A review of the decisions of the circuit courts establishes that the weight of authority is in

accord with the law of Canada in not permitting a recovery of such economic losses.

The legal effect of public policy, where it exists, has been misunderstood by the petitioners. There is no valid basis for asserting as petitioners are in this case, that public policy can be relied upon as a rule of law permitting a recovery of damages for a tort committed in a foreign territorial jurisdiction in which no such legal principle exists. As pointed out by the district court in the case at bar (App. p. 33):

> "It may be contended that there exists an overriding domestic policy for providing redress for the wrongful acts of negligent tortfeasors. It may even be asserted that the test of foreseeability, which is generally adhered to by the courts of Canada which was applied herein by Justice Addy, itself constitutes an established precept of tort law supporting the domestic policy of succoring the aggrieved complainant. It does not follow, however, that all logical (or attenuated) extensions of a given tenet of law, or the application thereof to the myriad permutations of factual circumstances, rise to the level of domestic policy, much less to the level of domestic policy sufficient in depth and weight to override the controlling law of a foreign nation. Indeed, the doctrine of *lex loci delicti commissi* is itself derived from a domestic and international policy or comity and *comitias gentium*. To accede to complainants' argument would emasculate existing domestic and international policy and accord only salutory recognition to the overriding principle of *lex loci delicti.*"

The controlling principle, we submit, is clearly set forth in *Black Diamond S.S. Corporation v. Robert Stewart & Sons*, 336 U.S. 386 (1949) at pages 395-396:

> ". . . But if it is the law of Belgium that the wrong creates no greater liability than that recognized by the Convention of 1924, we cannot, without more, regard our own statutes as expanding the right to recover. Any other conclusion would disregard the settled principle that, in the absence of some overriding domestic policy translated into law, the right to recover for a tort depends upon and is measured by the law of the place where the tort occurred. *Smith v. Condry*, 1 How. 28, 33, 11 L.Ed. 35; *Slater v. Mexican National R. Co.*, 194 U.S. 120, 24 S.Ct. 581, 48 L.Ed 900; *Cuba R. Co. v. Crosby*, 222 U.S. 473, 32 S.Ct. 132, 56 L.Ed. 274, 38 L.R.A., N.S., 40; *Western Union Telegraph Co. v. Brown*, 234 U.S. 542, 34 S.Ct. 955, 58 L.Ed. 1457."

The application of public policy to operate solely as a restraint upon the enforcement of a foreign right in our courts is set forth in *Cuba Railroad Company v. Crosby*, 222 U.S. 473, page 478:

> "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there."

There is no overriding domestic policy translated into law in the United States that requires the payment of vessel detention damages due to the negligent but unintentional obstruction of a public, navigable waterway which did not inflict physical damage to the vessel and certainly no such domestic public policy could be extended to apply within the territorial limits of Canada. The circuit courts which have ruled upon this question all deny recovery; *Petition of Kinsman Transit Company, supra, Dick Meyers Towing Service, Inc. v. United States, supra, Union Oil Company v. Oppen, supra,* and *Oppen v. Aetna Insurance Co.*, 485 F.2d 252 (9th Cir. 1973).

In *Capen v. Aetna Insurance Co., supra,* 485 F.2d 252 (9th Cir. 1973) also arising from the 1969 Santa Barbara oil spill, it was held that pleasure boat owners could recover for physical damage inflicted by the oil to their boats as damages recoverable for negligence, but the damage suffered on account of their loss of navigation rights in the Santa Barbara channel and harbor is no different in kind from that suffered by the public generally and is not recoverable (pages 259-260).

The decisions of the District Courts in *In Re China Union Lines, Ltd., supra,* and *In Re Lyra Shipping Co., Ltd., supra,* were overruled by the Fifth Circuit in *Dick Meyers Towing Service, Inc. v. United States, supra,* denying recovery for business losses to an operator of tug boats and other vessels due to the negligent obstruction of a public waterway.

The recoverability of vessel detention damages due to the obstruction of a waterway was not involved on appeal in *Gartland S.S. Co. v. Elgin, Joliet and Eastern Ry. Co., supra,* 277 F.2d 382 (7th Cir. 1960). The district court had ruled that the total damages arising out of the collision between a vessel and a drawbridge must be borne equally by the railroad as the owner and operator of the bridge and the vessel. Some vessel detention claims had been settled by the parties. The sole question on appeal was, on page 383:

> "The contested issue is whether the District Court's finding that the Fredborg was partially at fault for its collision with the bridge is 'clearly erroneous'."

The basis for the detention claims of vessels in the foregoing case is not disclosed by the opinion and may have arisen out of the invasion of special rights. In any event, that case does not hold that the recoverability of detention damages by a vessel is a matter of public policy.

The lack of any authority to support petitioners' claim of an overriding public policy translated into law in this country with respect to the recoverability of vessel detention damages under these circumstances is sought to be supplied by abstract generalizations concerning a variety of unrelated maritime cases which have no application in this context.

Petitioners refer to *Lauritzen v. Larsen,* 345 U.S. 571 (1953) as having a bearing on the issues. It involved a Jones Act, 46 U.S.C. § 688, suit filed in a federal district court in New York by a Danish seaman against a Danish shipowner for an injury sustained in a foreign port. It was held that the Jones Act was inapplicable because it would conflict with the law of Denmark. On page 583:

> "The solution most commonly accepted as to torts in our municipal and international law is to apply the law of the place where the acts giving rise to the liability occurred, the *lex loci delicti commissi.*"

Observing that the law of the flag applies to matters of internal discipline and to the personnel of a merchant ship because there must be some law on shipboard that cannot change at every change of waters, the court in *Lauritzen* reiterated its previous decisions in *United States v. Flores,* 289 U.S. 137, 158, and *Cunard Steamship Co. v. Mellon,* 262 U.S. 100, 123, on pages 585-586:

> "'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. . . .'"

Lauritzen v. Larsen, supra, held that the Jones Act could not be applied under the points of contact theory because a review of the connecting factors which either maritime law or our law of conflicts regards as significant shows an overwhelming preponderance in favor of Danish law.

In *Moragne v. States Marine Lines,* 398 U.S. 375 (1970) a longshoreman had a fatal accident aboard a vessel *within the territorial waters of the State of Florida.* An action was filed by his widow as representative of his estate in a State Court of Florida to recover damages for wrongful death and for pain and suffering prior to death predicated upon negligence and unseaworthiness of the vessel. The case was removed to a Federal District Court in Florida and the unseaworthiness count was dismissed for the reason that the law of Florida did not encompass unseaworthiness as a basis of liability. This court held that there was a cause of action for wrongful death based on unseaworthiness under federal maritime law.

Sea-Land Services, Inc. v. Gaudet, Adm'rx, 414 U.S. 573 (1974) involved successive actions for injuries and wrongful death of a longshoreman who was injured aboard a vessel *within the territory of the State of Louisiana.* Prior to his death, the longshoreman had recovered damages for wage losses, pain and suffering and medical expenses. Thereafter, he died and his widow filed a wrongful death action because his death allegedly resulted from the shipboard injuries for which he had recovered earlier. It was held that the wrongful death action was maintainable and damages could be recovered by a descendant's dependents for loss of support, services, and society, as well as damages for funeral expenses.

American Export Lines, Inc. v. Alvez, 100 S. Ct. 1673 (1980) involved an injury to a longshoreman sustained

aboard ship *within the territorial waters of the State of New York.* It was held that his wife could maintain an action for damages for the loss of her husband's society under the general maritime law.

The foregoing cases which involve injury and death to longshoremen within the territorial waters of the states of this nation have no perceptible bearing upon the recoverability of vessel detention damages due to the obstruction of a waterway within the territorial limits of a foreign nation. Although the general maritime law of this nation has been largely created by the decisions of federal courts in personal injury and death cases, the legal principles developed in them were not and are not intended to apply to the obstruction of a foreign waterway.

Petitioners assert that there is a second question presented by the decision of the Court of Appeals in this case (now reported in 631 F.2d 441) which allegedly arises from conflicting decisions of the circuit courts regarding the application of the decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927) with respect to the recoverability of vessel detention damages by time charterers rather than shipowners in cases arising from collisions between vessels. *We do not perceive any such question in the case at bar where the vessels did not sustain physical damage. Moreover, it was not a basis for the decision and there is actually no real conflict amongst the circuit courts upon this issue.*

In *Federal Commerce & Nav. Co. v. M/V Marathonian,* 528 F.2d 907 (2nd Cir. 1975) the time charterer lost the use of the chartered vessel due to a collision. Relying on *Robins Dry Dock & Repair Co. v. Flint, supra,* the court found that the time charterer's pecuniary losses were not recoverable. This court denied *certiorari,* 425 U.S. 975 (1976).

In *Venore Transp. Co. v. M/V Struma,* 583 F.2d 708 (4th Cir. 1978), it was held that where there was no suspension in the payment of charter hire while the vessel was out of service following a collision, the time charterer which paid the charter hire is entitled to recover what the shipowner would have been entitled to recover had the charter payments been suspended but the time charterer could not recover any lost profits. Therefore, either the shipowner or the time charterer, but not both, could claim such damages for loss of use from another vessel and its owner following a collision between two vessels. On page 710:

> "The principle of *Robins Dry Dock* is perfectly defensible, if pragmatic considerations require the foreclosure of remote damage claims. The tortfeasor, having paid the owner for its loss of use of the vessel, should not be required to pay additionally for the time charterer's loss of anticipated profits. A pragmatic approach would require that the offending vessel pay for the loss of use of the damaged vessel once, but no more. Unless the offending vessel is required to pay for the loss of use of the Oswego Liberty in this case, however, it would never be required to pay at all. The owner lost no charter hire. It could not claim a loss it had not suffered, and it did not do so. But payment for loss of use of the damaged vessel is a conventional item of recovery, and the fact that the charter party has transferred the risk of loss of use from the owner to the time charter should not extinguish the right to a recovery of a traditional item of damages. There is nothing remote about these damages; the only objection is that they were suffered by the time charterer rather than by the owner."

And continuing on page 711:

> "We do not intend, however, to suggest that the time charterer is entitled to lost profits. That kind of claim is foreclosed by *Robins Dry Dock*. The traditional item of recoverable damage is the owners claim for loss of use. . . ."

And continuing on page 711:

> "In *Robins Dry Dock*, Mr. Justice Holmes wrote broadly, as he customarily did, but there is no inconsistency in our holding and that of the Supreme Court in *Robins Dry Dock*. Nor do we enlarge in any way the type of damages which have been traditionally recoverable, nor the offending vessel's obligation of recompense. Under our holding the Stroha and her owner will pay no more than they would have if the charter had provided for a suspension of charter hire while the vessel was laid up.
>
> "Thus we conclude that either the owner or the time charterer, but not both, may claim damages for loss of use depending upon the charter's placement of the risk of loss of use."

The Fourth Circuit in *Struma* considered the award of detention damages to a time charterer for loss of use of a vessel during repairs after a collision with another vessel in the same amount as the customary loss of use which would be otherwise awarded to a shipowner as not being inconsistent with the rule in *Robins Dry Dock*. Since there is no inconsistency, there is no conflict. Awarding loss of use during detention for repairs to a vessel damaged in collision with another vessel was considered traditional and so long as the amount awarded was the same to a shipowner or time charterer, but not both,

and excluded any loss of profit, it was not considered an award of damages for negligent interference with a contract or loss of the expectancy of a profit from a business relationship.

The assertion by petitioners that the court below ignored its own decision in *National Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339 (1978) is incorrect. A railroad bridge owned by the plaintiff steel company was damaged by defendant towing company when a ship in tow of its tugs struck the bridge. The bridge could not be used for three days while repairs were being made and it is the only means of transporting molten iron from its plant on an island to the mainland where it is processed in another portion of its plant into steel slabs. There was a loss of production while the repairs were being made. Defendant towing company contended that there was no right to recover damages because they were too remote under the opinions in *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2nd Cir. 1964) and 388 F.2d 821 (2nd Cir. 1968). The court disagreed and stated on page 343:

> "The facts of that case are far removed from the events on the Rouge River. Unlike the mishap piled upon mishap in the Kinsman case, 'an extraordinary concatenation of even more extraordinary events, not unlike the humorous and almost—beyond—all—imagination sequences depicted by the famous cartoonist Rube Goldberg.' 338 F.2d 708, 727, in this case the sequence of events was direct, immediate, and predictable. The boat struck the railroad bridge due to defendant's negligence, causing structural damage. Since transportation across the bridge was a necessary link in National Steel's production process, plaintiff lost production time during the three days required to

repair the bridge. While we agree that at some point the link between cause and effect may be 'too tenuous —that what is claimed to be consequence is only fortuity,' 338 F.2d at 725, that point was not reached in this case."

The distinction between *National Steel Corp., supra,* and this case is obvious. The railroad bridge involved was owned by National Steel Corporation and formed an indispensable transportation link between various buildings and operations in its steel-making plant. Raw material was smelted into molten iron at blast furnaces on an island and then transported in special railroad cars over its bridge across the river to the mainland where its slab mill was located. The damage to its bridge directly and proximately caused production losses because of the inability to transport the molten iron to the slab mill within its plant.

CONCLUSION

The law of Canada as construed by its own courts denies any recovery for economic losses to vessels detained but not physically damaged by the negligent obstruction of a navigable public waterway within its territory and is applicable and controlling on the same facts in the courts of the United States. The Court of Appeals did not err in its interpretation of the applicable law of Canada which was the basis of its decision. The decision below did not involve any important question of federal law which has not been, but should be, settled by this court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this court or of another

Court of Appeals on the same matter. The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

LUCIAN Y. RAY
JOHN H. HANNINEN
Counsel of Record
RAY, ROBINSON, HANNINEN & CARLE
1050 Union Commerce Building
Cleveland, Ohio 44115
(216) 861-4533
Counsel for Respondent